

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LEE FRITZ,

Defendant-Appellant.

UNPUBLISHED

November 10, 2005

No. 254390

Midland Circuit Court

LC No. 03-001741-FH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c). Defendant's convictions arise out of a sexual encounter with a resident of the mental health facility where he was employed. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 180 to 270 months' imprisonment, with credit for time served. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant first argues that the prosecution failed to produce sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that the victim was mentally incapable of consent. We disagree. When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). We do not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992).

A person is guilty of committing CSC III if he engages in sexual penetration with another person whom he knew or had reason to know was mentally incapable. MCL 750.520d(1)(c); *People v Breck*, 230 Mich App 450, 451; 584 NW2d 602 (1998). "Mentally incapable" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." MCL 750.520a(g). This definition encompasses the victim's understanding of the physical act, as well as appreciation of the nonphysical factors that accompany the act, such as the moral quality of the act. *Breck*, *supra* at 455.

Defendant argues that the evidence shows that the victim was capable of making her own sexual decisions because she was married and because the victim testified that she understood the moral and practical consequences of having sex with defendant. However, our review of the record, including the victim's testimony, reveals that the victim was not mentally capable of consenting to sexual relations with defendant.

The victim suffers from mild mental retardation,¹ schizophrenia, and is unable to live independently. The victim did acknowledge on cross-examination that people do not have the right to engage in sexual relations with her if she does not want them to. She further testified that she knows that having sex with defendant was wrong because they were both married to other people.

However, her testimony as a whole evidences disorganized patterns of behavior, speech, and thought, including a tendency to lapse into extended periods of incoherency. This is consistent with her diagnosis as being schizophrenic. In addition, one of the other residents at the mental health facility testified that the victim is defenseless. The victim's guardian and the director of the mental health facility both testified that the victim's personality is such that she will do anything for attention. An intellectual assessment of the victim notes that she "can be easily persuaded and taken advantage of" and recounts a specific incident occurring prior to the sexual contact with defendant in which she was unaware that she was being taken advantage of during a sexual encounter. Viewing this evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence for the trial court to find beyond a reasonable doubt that the victim was "temporarily or permanently incapable of appraising the nature of his or her conduct," MCL 750.520a(g), and thus mentally incapable of consenting to sexual contact with defendant.²

Defendant next challenges the scoring of offense variables (OVs) 3 and 8. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002)(citation and internal quotation marks omitted).

We reject defendant's argument that the trial court erroneously scored fifteen points under OV 8 for asportation of the victim. Even though there was no evidence of struggle, an asportation can be accomplished without using force against the victim. *People v Spanke*, 254 Mich App 642, 646-647; 658 NW2d 504 (2003). The evidence supports a finding that defendant moved the victim to the basement and then to a room in the basement, away from the safety of the others in the household, in furtherance of the assault. See *id.* at 648.

However, we agree with defendant that the trial court improperly scored ten points under OV 3 for "[b]odily injury requiring medical treatment." MCL 777.33(1)(d). As the prosecution

¹ She has an IQ of 62.

² Indeed, the victim's testimony shows that she told defendant she did not want to engage in sexual relations, but that this was ignored by defendant.

concedes, there was no injury to the victim in this case. Therefore, a score of zero points is required. MCL 777.33(1)(f). However, the trial court's scoring error does not require resentencing because defendant's corrected score would not result in a different recommended guidelines range. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993) (finding that an error in scoring the sentencing guidelines that does not affect the total OV score enough to change the applicable sentencing guidelines' range is harmless error). Therefore, we conclude that the trial court's error is harmless and defendant is not entitled to resentencing.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter